

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

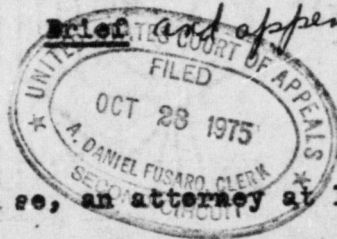
75-7552

O/A docket no. 75-7552

SAMUEL SCHEIN, an attorney,
Plaintiff-appellant,

v.

U. S. A. et al.,
Defendants-appellees.



SAMUEL SCHEIN, appellant pro se, an attorney at law,
appeals and seeks review of the final decision of Hon. Kevin
T. Duffy, U.S.D.J., entered September 9, 1975 on the back of
defendants' Notice of Motion and Affidavit, "Motion granted
So ordered", which dismissed the complaint.

The grounds stated in the Notice of Motion were "for lack
of jurisdiction over the subject matter" and "for failure to
state a claim upon which relief can be granted". Plaintiff's
complaint, consisting of ²⁶ pages, alleges in the very 1st
paragraph that: "Jurisdiction is founded on 28 Section 1346 (2)
(b), U. S. Code, which states that the district courts shall
have exclusive jurisdiction of civil actions on claims against
the U. S. for money damages and for injury by the negligent or
wrongful act of any employee of government". The 2nd paragraph
states that: "Plaintiff alleges that there was during the years
of 1964 and 1965 and thereafter, wrongdoing, corruption and
the fixing of a very substantial tax case by President Lyndon
B. Johnson and by above named defendants, high officials of
the Internal Revenue Service, against the interests of the
U. S. government and the plaintiff, a claimant for reward".
At the top of the 1st page of the complaint, alongside of the
caption, it is stated that: "COMPLAINT pursuant to Federal
Tort Claims Act, 28 U. S. Code, §2671 et seq." Relief can be
granted as provided in the Federal Tort Claims Act for money
damages and compensation for causing plaintiff's injuries and
almost fatal acute heart attack.

The main issue and question presented for review is:



Was Judge Kevin T. Duffy's final decision erroneous?

This action is to recover for personal injuries. An Administrative Claim Notice, a jurisdictional prerequisite, as stated in 28 U. S. Code, @2675 (a) and (b), was served on June 2, 1975 via certified mail "on Commissioner Donald L. Alexander, I. R. S., and on Edward H. Levi, U. S. Attorney General". (Paragraph 3 of the complaint) June 24, 1975 the complaint was filed, summons issued, and served on June 26, 1975 as indicated in Appendix docket entry of 7-3-75. Paragraph 8 of the complaint, page 2, alleges: "Inevitably, the pressure and wrongdoing brought on and directly produced in the plaintiff serious personal injuries, occurring during the year 1974, including malignant tumors and an almost fatal acute heart attack". Paragraph 7 of the complaint, page 2, alleges: "The alleged mistreatment and abuse, the disappointment, aggravation and frustration, together with the wrongdoing, corruption and fixing of a millions of dollars tax case, engendered, fostered and built up inside the plaintiff and served to consume him with worry and anxiety". Paragraph 91 of the complaint, page 18 alleges: "Plaintiff's immediate reaction is shown in his letter of May 13, 1965 to the N. Y. C. District Director:

"Received your letter of May 10, 1965 and you will give me a heart attack".

1965

"Your letter of May 10, 1965 is cruel and unconscionable. If your decision stands for the Internal Revenue Service, it is despicable procedure".

Plaintiff did eventually and inevitably suffer and sustain a nearly fatal acute heart attack, myocardial infarct, on October 31, 1974, directly attributable to the despicable procedure and corruption of the I. R. S., as will be alleged in more detail hereinafter". Paragraph 127 of the complaint, page 24, alleges: "On March 7, 1974, plaintiff, who was suffering from an attack of basic cell carcinoma, the development of two large malignant tumors, directly attributable to the facts alleged in items 123, 124 and 125 above, required

and sustained surgical excise operation by a dermatologist, leaving a permanent scar on his body, alongside the navel, about 3 square inches, which has not fully healed to this date". Paragraph 123 of the complaint, page 25, alleges: "On October 31, 1974 Plaintiff suffered and sustained an almost fatal acute heart attack, a myocardial infarction and a cerebral infarct, directly attributable to the facts alleged in items 123, 124 and 125 above. Plaintiff was rushed in the "nick of time" in emergency by ambulance to Maimonides Hospital in Brooklyn, N. Y. There he was treated, brought back from unconsciousness, and placed under intensive care for 5 days and was required to be hospitalized for a period of 18 days. He was discharged from the hospital on November 19, 1974 and had to remain in his home resting for about another 4 weeks". The prayer for relief, page 26 of the complaint, reads:

"Wherefore, it is most respectfully prayed of this Court to grant judgment in favor of plaintiff against the defendants in the sum of \$750,000., or in such amount as the Court may deem fair, reasonable and equitable, as damages and compensation for causing plaintiff's injuries and heart attack, and prays for such other and further relief as the Court may deem just and proper".

Upon receipt in the mail on August 14, 1975 of defendants' Notice of motion to dismiss, Affidavit with Exhibits A, B and C, and Memorandum with citation Exhibits A and B, plaintiff arranged an adjourned date of the motion returnable on August 26, 1975 to September 9, 1975, at 2:15 P. M. Plaintiff's letter to the Court, dated August 14, 1975, confirmed the adjournment, and in addition, "most respectfully prayed of the Court that plaintiff be permitted to argue in opposition to the motion to dismiss the complaint". (Letter, 8-14-75, in docket filed papers)

Defendants' Affidavit on the Motion to dismiss, has attached Exhibit A, a copy of a complaint "filed by Samuel Schein

on February 22, 1972 in the United States District Court for the Eastern District of New York". Attached also as Exhibit B is a copy of "the complaint filed by Samuel Schein on March 14, 1975 in the Eastern District after Judge Neaher's dismissal of the first complaint". Attached also as Exhibit C "is the Order of Dismissal signed by Judge Neaher, dismissing this second complaint." Defendants' Memorandum Filed 8-13-75 consists of 13 pages, 7 pages being captioned as "Statement of Facts" and balance of 6 pages being captioned "Argument". Attached to the Memorandum are copies of 2 case citations marked as Exhibits A and B. Defendants have misconstrued the gravamen of the complaint to recover for personal injuries as "attempts to obtain informant's rewards for information allegedly provided the IRS". Defendants' version, "Statement of Facts", is distorted and makes untrue assumption that "Plaintiff is now once again in Federal court seeking review of these discretionary decisions to deny his reward claim". Defendants have mistakenly proceeded on the basis that "His action was based on the same facts as are pleaded in the present complaint" and that "The pleaded facts however, were essentially the same as in the first action". Defendants' "Argument" states POINT I and POINT II, which are the same as the grounds related in the Notice of Motion. POINT I is subdivided as follows:

A. The Bar of Sovereign Immunity.

B. No Jurisdiction Over Tort Claim. Thereunder, the statement that "The wrongful act or omission that is alleged to have caused plaintiff's injury is the denial of his claim for reward" is incorrect.

C. No Other Jurisdictional Basis For Plaintiff's Claim. POINT II relates a series of untrue ~~assumptions~~ ^{assumptions,} such as:

"First, plaintiff's own pleadings make clear that he has previously litigated the same matters now raised" and "Principles of res judicata and collateral estoppel prevent relitigation of this matter" and "Of course, a reading of

plaintiff's supposed tort claim indicates that he has not stated a tort claim at all". Defendants' legal reasoning ~~shows~~ that plaintiff's claim "If viewed as a tort, presupposes some duty owed by defendants to him arising out of his claim-^{to} ed right/a reward", followed by his non-sequitur conclusion that "Since as a matter of law no such duty is owed, plaintiff has failed to state a claim upon which relief can be granted" is all wrong. Plaintiff prepared his Affirmation Opposing Motion To Dismiss, dated September 8, 1975, consisting of 14 pages, which refuted item by item each of the matters stated in the defendants' moving papers.

On September 9, 1975 at 2:15 P. M., the adjourned date of the Motion to Dismiss, plaintiff presented himself at Judge Duffy's chambers, ready to argue in opposition. Plaintiff was instructed that the Court would not hear any argument. Plaintiff then submitted his 14-page Affirmation in Opposition, together with the Administrative Claim Notice of 6-2-75. The Court's final decision, endorsed on the back of the Notice of Motion, "Motion Granted. So Ordered", is dated September 9, 1975. Apparently, no consideration was given to plaintiff's Opposing Affirmation.

ARGUMENT.

In summary, defendants held and insist that plaintiff's complaint aims and attempts to obtain informant's rewards for information furnished to the I. R. S., while Plaintiff knows that his action is brought to recover for personal injuries pursuant to The Federal Tort Claims Act, 28 U. S. Code, @2671 et seq. and as authorized by Section 1346 (2) (b), U. S. Code.

This Court of Appeals is most respectfully referred to plaintiff's Affirmation in Opposition, consisting of ¹⁴ ~~12~~ pages, Appendix docket entry of 9-11-75, which covers explicitly all of the items raised in defendants' moving papers. Plaintiff proceeds herein to quote from said Affirmation in Opposition.

The last 2 sentences, item 2, page 1, Affirmation, are:

"The Complaint of February 22, 1972 contained no statement, allegation or claim as to personal injuries. In fact, the personal injuries complained of specifically, ulcers and body skin carcinoma, cerebral infarction and acute myocardial infarction, actually occurred during the year 1974."

In item 3, pages 1 and 2, Affirmation, as to plaintiff's former Complaint of March 14, 1975, it is stated starting with 2nd sentence on page 2, as follows:

"Plaintiff must stress that the present Complaint alleges and proceeds as a completely, pure tort action and plaintiff has specifically withdrawn and eliminated any claimed cause of action based upon expressed or implied contract. A reading of Judge Neaher's order, dated June 3, 1975, submitted as Exhibit C by the defendants, shows that plaintiff "having acknowledged by affidavit dated May 29, 1975 and orally before the court that he was withdrawing his original action herein and seeking leave to file an amended complaint stating a cause of action cognizable under the Federal Tort Claims Act". Judge Neaher ruled that said "plaintiff's action herein be, and it is hereby, dismissed pursuant to Rule 12(h) (3) due to this Court's present lack of subject matter jurisdiction over such action". It appears that the Court felt that there was a lack of present subject matter jurisdiction because plaintiff then had not filed an administrative claim, in accordance with 28 U. S. Code @2675 (a) and (b), a jurisdictional prerequisite. In the present Complaint, as alleged in paragraph 3 thereof: "An ~~administrative~~ administrative claim, in accordance with 28 U. S. Code @2675 (a) and (b), a jurisdictional prerequisite, was filed via certified mail on June 2, 1975 on Commissioner Donald L. Alexander, I. R. S., and on Edward M. Levi, U. S. Attorney General."

REMARKS

In item 4, pages 2 and 3, Affirmation, as to defendants' Memorandum, foot-note on page 9 thereof urges that subject matter jurisdiction is lacking because plaintiff has failed to file his administrative claim "and receive a denial, or wait six months without receiving a decision", it is stated, page 3:

"Under the circumstances herein, plaintiff felt that denial of his matter as an administrative claim was a foregone conclusion. To wait another six months, after so many years, for a denial decision, appeared to be useless and unnecessary. Plaintiff moved to follow promptly the provision as stated @2675 (b), that "The claimant, however, may upon fifteen days written notice, withdraw such claim from consideration of the federal agency and commence action thereon." In item 11 of his Notice of Administrative Claim, plaintiff stated: "hereby gives written notice that after 15 days, by June 20, 1975, he will withdraw this claim from consideration of the federal agency and commence action under The Federal Tort Claims Act, 28 U. S. Code, §2671 et seq."

In item 5, pages 3 and 4, Affirmation, as to defendants' "Statement of Facts", it is stated as follows:

"Plaintiff has set forth in his 134 paragraph Complaint,

as best he could, a chronological recital of the facts and spelled out conclusively the long list of acts of wrongdoing and corruption on the part of the I. R. S. and President Johnson. This was not done to "spell out in elaborate detail his attempts to obtain informant's rewards for information allegedly provided the IRS". The reference again to plaintiff's two "separate lawsuits" is intended to impress and mislead ~~him~~ this Court into viewing the present case as the same or similar to the previous actions. This is not the fact, and defendants' statement that plaintiff is now "seeking review of these discretionary decisions to deny his reward claim" is completely without foundation. Plaintiff's instant Complaint nowhere mentions any review of decisions, discretionary or otherwise."

In item 6, page 4, Affirmation, last 2 sentences item 6, it is stated:

"Defendants' statement that: 'His action was based on the same facts as are pleaded in the present complaint' is simply not true. The February 22, 1972 Complaint nowhere mentions any cause of action for personal injuries, and Judge Neaher's decision did not encompass dismissal of any personal injuries claim."

In item 7, page 4, Affirmation states as follows:

"The March 14, 1975 Complaint did contain a cause of action for personal injuries based on a most 'despicable abuse of power and of discretion by the Internal Revenue Service and by President Johnson'. But nowhere therein was there an allegation as to negligent wrongdoing, as is erroneously stated in defendants' Memorandum, top of page 7. It so happens that wrongdoing and corruption are the essential ingredients in the present action. Again, the defendants' statement that 'The pleaded facts, however, were essentially the same as in the first action' is incorrect."

"Defendants' belaboring of the dismissal of both prior Complaints is unwarranted, because neither dismissal is binding as to the present Complaint, which is for personal injuries caused by defendants' wrongdoing and corruption."

In item 8, page 5, Affirmation, as to defendants' Point I, A, of the Memorandum, "The Bar of Sovereign Immunity", it is stated as follows:

"Plaintiff's Complaint is founded specifically on wrongdoing and corruption by the IRS and by President Johnson. It is submitted that acting wrongfully, wrongdoing and corruption, do not fall within the scope of the official functions of the IRS or of the President. . . . Statutory grant specifically is followed, as appears from the very 1st paragraph of the Complaint and the descriptive words alongside the caption of the action: 'COMPLAINT pursuant to Federal Tort Claims Act, 28 U. S. Code, 2671 et seq.'"

In item 9, pages 5 and 6, Affirmation, as to defendants' Point I, B, of the Memorandum, "No Jurisdiction Over Tort Claim, it is stated that: The wrongful act or omission that is alleged to have caused plaintiff's injury is the denial of his claim for reward."

Item 9, page 6, Affirmation, states, 2nd Sentence: et seq.

"Plaintiff must point out that nowhere in the Complaint is there any allegation that the wrongful act causing plaintiff's injuries was the denial of his claim for reward. There is a vast difference between denial of his claim for reward and the causes cited throughout the Complaint for plaintiff's injuries. This Court is most respectfully referred to items of the Complaint: 117, "the Service's offer of a reward was in fact meaningless and a sham, and that the representation and promise of reward served only as an inducement"; 118, "Thus it is alleged that the Service's procedure and operation in the handling of plaintiff's claims for reward were fraudulent and dishonest, and did practice and work a fraud upon Claimant, who feels terribly victimized thereby; 120, "Worst of all, and causing most of plaintiff's aggravation, frustration and disappointment herein, was the realization that this millions of dollars tax case was "fixed" by wrongdoing, corruption and probably pay-offs to both the Service officials and to President Johnson; 114, "Plaintiff became particularly upset and exasperated with the Service's despicable procedure of shifting jurisdiction over his claims for reward by the Director, ~~the~~ Intelligence Division, from the N. Y. C. District, to the Scranton District, to the Philadelphia District and then back to the N. Y. C. District Director."

Item 9, 2nd paragraph, pages 6 and 7, Affirmation, states:

"Defendants cite 28 U. S. C. @2680 that "the provisions of @1346 (b) shall not apply to any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government". Defendants go on to discuss this exclusionary language of 28 U. S. C. @2680 (a), without taking cognizance that plaintiff's Complaint presently makes no mention anywhere of "abuse of discretion". * * * * * Plaintiff must repeat that this present Complaint is based on wrongdoing and corruption, and "wrongdoing" is the very word, or "wrongful act", are the very words stated in Section 1346 (2) (b). Defendants appear to be arguing that the exclusionary language of 28 U. S. C. @2680(a) as to "abuse of discretion" should be enlarged to exclude also "wrongdoing, wrongful act and corruption and "fixing" of cases". It is respectfully submitted that the law excluding "abuse of discretion" is bad enough; there is no such exclusionary provision anywhere as to "wrongful act". Perhaps, the defendants are trying to convince the Court, that the IRS and the President are within their rights and authority even when they act wrongfully, corruptly and fix substantial tax cases.

Item 9, middle of page 7, Affirmation, states:

"Defendants cite *Divenne v. I. R. S.* and submit as Exhibit A with their Memorandum, a 6-page opinion of Judge Robert L. Carter, and state that "Judge Carter's decision applies with equal force to the instant action". The latter decision is clearly distinguishable from plaintiff's instant Complaint. There Plaintiff claimed he is entitled to a reward for supplying information, here plaintiff claims damages for personal injuries. On page 4 of said opinion, it is stated: "By the Federal Tort Claims Act, the U. S. has waived immunity with respect to certain actions in tort". The opinion goes on to discuss the waiver does not apply as to exercise or performance or the failure to exercise or perform a discretionary duty on the part of a federal agency. The key word is "Discretionary". Plaintiff in the instant action must point out again that his Complaint is based on wrongdoing and corruption, and not any claim of "abuse of discretion". -3-

Item 10, pages 8 and 9, Affirmation, states:

"As to Defendants' Memorandum, Point II, page 11, it is stated: 'plaintiff's own pleadings make clear that he has ~~previously~~ previously litigated the same matters now raised'. This theme is repeated throughout defendants' memorandum, and plaintiff shows conclusively that defendants are wrong in this contention. * * * * * The action for personal injuries is wholly distinct and separate from the action on implied contract and quantum meruit. * * * * * Furthermore, the actual personal injuries complained of, an almost fatal acute heart attack and skin cancer occurred in the year 1974, so that plaintiff could not possibly have made any claim thereon in February, 1972. Defendants' statement that 'Principles of res judicata and collateral estoppel prevent relitigation of this matter' appears to be another unfounded contention. Defendants are assuming and ruling that this Court will agree that the matters and issues of this Complaint have been previously litigated. For the reasons advanced by plaintiff above, in this very paragraph, it is submitted that the Court should find that there has been no previous litigation of the instant Complaint for personal injuries."

Item 11, pages 10 and 11, Affirmation, states:

"Defendants go on to urge that 'his complaint simply does not state a claim upon which relief may be granted'. * * * * * Defendants are continuing to insist that plaintiff's claim is 'based upon a purported right to an informant's reward'. Plaintiff has been specially careful not to make any such allegation in the instant Complaint, and he does not base his Complaint on a right to an informant's reward, and if there is any such allegation in the Complaint, he withdraws it completely. * * * * * Again, defendants discuss 'There is no duty owed to a plaintiff to provide a reward', when plaintiff disavowed and disavows in this Complaint any cause of action as a Claimant For Reward. Then he goes on with 'This legal reasoning must apply with equal force to bar Mr. Schein's claim which, if viewed as a tort, presupposed some duty owed by defendants to him arising out of his claimed right to a reward'. Counsel keeps harping on claimed right to a reward, when plaintiff alleges right to a reward is out of this case. However, plaintiff does presuppose a duty and an obligation to him as a citizen and a taxpayer, by the defendants to perform their work and services to the U. S. honestly and properly, not wrongfully and corruptly. * * * * *

"Defendants' final statement in their Memorandum that: 'Since as a matter of law no such duty is owed, plaintiff has failed to state a claim upon which relief can be granted' is his, counsel's, conclusion, and it is without support or foundation herein. Certainly, there is a duty owed to plaintiff and to all persons that the defendants, working and serving the government, operate and perform honestly and properly, not wrongfully and corruptly, and not 'fix' tax cases. Even, a former Claimant For reward, your plaintiff, an attorney, is owed such a duty. * * * * * Section 2677 shows that 'The Attorney General, with the approval of the Court, may arbitrate, compromise, or settle any claim cognizable under Section 1346 (2) (b) ----- after the commencement of an action thereon'."

Item 13, page 12, Affirmation, states:

"The whole purport of Defendants' Memorandum is to affix Judge Neaher's decision of the February, 1972 Complaint onto plaintiff's present tort action Complaint. The said two actions were and are entirely separate and different; the

prayers for relief in each instance are clearly distinguishable. In the 1972 case, plaintiff sought "for an allowance of compensation and a reward based on the amount of additional taxes recovered and attributable to the information furnished and based on what amount the Court finds that plaintiff earned, is entitled to, and should be paid". In the present Complaint, the prayer for relief states: WHEREFORE, it is respectfully prayed of this Court to grant judgment in favor of plaintiff against the defendants in the sum of \$750,000., or in such amount as the Court may deem fair, reasonable and equitable, as damages and compensation for causing plaintiff's injuries and heart attack, and prays for such other and further relief as the Court may deem just and proper".

Item 14, page 12, Affirmation, states as follows:

"Defendants' Memorandum, bottom of page 4, criticizes the fact of plaintiff's submission of his 11-page Appeal For Review And Reconsideration, together with a 12-page Digest And Brief, With Extracts, On Appeal, to Honorable Lyndon B. Johnson, President of the U. S. A. and to Honorable H. Alan Long, Director, Intelligence Division, Internal Revenue Service. It is to be noted that President Lyndon B. Johnson, and Director, Intelligence Division, H. Alan Long, are named as defendants in the present Complaint. Plaintiff believes and will show that President Johnson received a contribution of \$1,000,000 from the reported corporate taxpayer in return for favoring and "fixing" the latter's tax case with the I. R. S. This "fixing" was accomplished through the co-operation of Intelligence Director, Mr. Long, the resignation of Mortimer Caplin, as Commissioner, I R S., having been compelled by the President on May 22, 1964. Back on the date of said Appeal, June 1, 1965, plaintiff felt ~~a~~ strongly that he had earned a fee fairly and squarely by serving the best interests of the U. S., regardless and despite the "fixing" by the said defendants. At that time, it was still within their power to recommend and provide some fee and compensation for the plaintiff. Thus, plaintiff tried as best he could, actually begged, for reconsideration and the granting of some part of an allowance and a fee. Plaintiff has related the foregoing in order to show this Court the kind of aggravation, pressure and frustration he had to suffer and endure in this matter".

On October 24, 1975 plaintiff received a letter from defendants' counsel advising that Federal Rules of Appellate Procedure require that in civil cases a \$250. bond for costs or equivalent security shall be filed by the appellant.

On October 28, 1975 plaintiff furnished and filed security for costs on appeal in the sum of \$250., by delivering his certified check in said amount to the Clerk U. S. District Court, Southern District of New York.

CONCLUSION.

The decision and Order dismissing the Complaint is erroneous. Defendants' motion to dismiss should have been denied. Plaintiff respectfully prays that the decision be

reversed and that it be Ordered that defendants' motion to dismiss be denied; that Plaintiff's Complaint be reinstated; that under the circumstances, this action be removed from the Hon. Kevin T. Duffy, Judge, and be reassigned under the random allocation process to another U. S. District Court Judge, or to Court of Appeals Judge Harold R. Medina or Judge William H. Mulligan, subject to acceptance on their part; that the Defendants be directed to serve and file their Answer to the Complaint within 30 days or such other time as the Court may deem reasonable, so that this action may proceed in regular course; that this matter be set down for a hearing and conference with a view to working out a compromise, or settlement, with the approval of the Court; and plaintiff prays for such other and further relief as the Court may deem just and proper herein.

Dated: October 28, 1975.

Respectfully submitted,

Samuel Schein
Samuel Schein

Appellant pro se

125 East 13th Street,

Brooklyn, New York 11226.

Telephone (212) IN 2-0865

Carbon Copy To:

Paul J. Curran
United States Attorney for the
Southern District of N. Y.
Attorney for Defendants.
By: William G. Ballaine
Assistant U. S. Attorney

COPY RECEIVED
Paul J. Curran
UNITED STATES ATTORNEY
10/28/75 *P*

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

C/A docket no. 75-7552

SAMUEL SCHEIN, an attorney,

Plaintiff-appellant,

v.

Appendix

U. S. A. et al.,

Defendants-appellees.

SAMUEL SCHEIN, Plaintiff, an attorney duly admitted to practice in the courts of the State of New York affirms under penalty of perjury, that the following are the filed papers and a copy of the docket entries in the District Court as well as the final decision of that court, Hon. Kevin T. Duffy, File number 75 CIVIL 3061.

6-2-75 Administrative claim notice served by cert. mail.

6-24-75 Filed Complaint. Issued Summons.

7-3-75 Filed summons and return-served Commissioner of Internal Revenue, Wash., D. C. by cert. mail #162815 on 6-26-75, Atty. Gen., Wash., D. C. by cert. mail #162815 on 6-26-75, U. S. Atty., by R. Lee on 6-26-75.

8-13-75 Filed Defats Affidavit and Notice of Motion for an order dismissing the complaint for lack of jurisdiction. Ret. 8-26-75.

8-13-75 Filed Defats Memorandum in support of motion to dismiss.

8-14-75 Plaintiff's letter to the Court "to confirm that the motion to dismiss the complaint noticed for 8-26-75 is adjourned to September 9, 1975, at 2:15 P. M." and "In addition, it is most respectfully prayed of the Court that plaintiff be permitted to argue in opposition to the motion to dismiss the complaint".

9-11-75 Filed Pltff's Affirmation in opposition to defats' Motion to dismiss the complaint. (By Samuel Schein, pltff atty. pro se)

9-10-75 Filed Memor. Endorsed on Notice of Motion filed 8-13-75. . . . Motion Granted. So Ordered. Duffy, J.

10-2-75 Filed Notice of Appeal to the U S C A for the 2nd Circuit from the endorsed Order of Hon. Duffy.

Dated: October 28, 1975.

Samuel Schein

Samuel Schein
Appellant pro se

Issues Proposed On Appeal And For Review.

The granting of the government's motion to dismiss "for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted" is erroneous. The motion should have been denied. Jurisdiction is founded on Section 1346 (2) (b), U. S. Code, that the district courts shall have exclusive jurisdiction of civil actions against the U. S. for money damages and for injury by the wrongful act of any employee of government. Relief can be granted as stated in the Federal Tort Claims Act, 28 U. S. Code, @2671 et seq., for money damages and compensation for causing plaintiff's injuries and heart attack.

Relevant Portions Of The Pleadings And Parts Of
The Record, Directed To Attention Of The Court.

1. June 2, 1975 Administrative claim notice described at beginning: "Administrative claim filed pursuant to Federal Tort Claims Act, 28 U. S. Code, :@2675(a) and (b) as jurisdictional prerequisite evidence". Paragraph 1 states: "Over a period of more than 15 years, plaintiff, as a claimant for reward with the I. R. S., has been despicably mistreated and abused". Paragraph 11, the last paragraph states: "Plaintiff hereby gives written notice that after 15 days, by June 20, 1975, he will withdraw this claim from consideration of the federal agency and commence action under The Federal Tort Claims Act, 28 U. S. C. @2671 et seq."

2. June 24, 1975 Filed Complaint consisting of 26 pages alleging as follows:

(1) "Jurisdiction is founded on Section 1346 (2) (b), U. S. Code, which states that the district courts shall have exclusive jurisdiction of civil actions on claims against the U. S. for money damages and for injury by the negligent or wrongful act of any employee of government".

(2) "Plaintiff alleges that there was during the years of 1964 and 1965 and thereafter, wrongdoing, corruption and the fixing of a very substantial tax case by President Lyndon B. Johnson and by above named defendants, high officials of the Internal Revenue Service, against the interests of the U. S. government and the plaintiff, a claimant for reward".

Closing paragraph, prayer for relief, states:

"Wherefore, it is most respectfully prayed of this Court to grant judgment in favor of plaintiff against the defendants in the sum of \$750,000., or in such amount as the Court may deem fair, reasonable and equitable, as damages and compensation for causing plaintiff's injuries and heart attack, and prays for such other and further relief as the Court may deem just and proper".

3. August 13, 1975 Filed Defendants Affidavit and Notice of Motion for an order dismissing the complaint, seeking:

"(i) an order * * * * * dismissing the complaint for lack of jurisdiction over the subject matter, (ii) an order * * * * * dismissing the complaint for failure to state a claim upon which relief can be granted, and (iii) for such other and further relief as the Court may deem just and proper".

4. September 11, 1975 Filed Plaintiff's Affirmation in opposition to Motion to dismiss the complaint, consisting of 14 pages, showing on page 12 under item 14, as follows:

"Plaintiff believes and will show that President Johnson received a contribution of \$1,000,000 from the reported corporate taxpayer in return for favoring and "fixing" the latter's tax case with the I. R. S."

Dated: October 28, 1975.

Respectfully submitted,
Samuel Schein
Samuel Schein
Appellant pro se

To: Paul J. Curran, U. S. Atty.
Southern Dist. N. Y.
by William G. Ballaine
Assistant U. S. Attorney

COPY RECEIVED
Lawrence J. Curran
UNITED STATES ATTORNEY
10/28/75 - [Signature]